Chua Qwee Teck v Public Prosecutor

HIGH COURT (SINGAPORE) — CRIMINAL REVISION NO 9 OF 1990
CHAN SEK KEONG J
29 NOVEMBER 1990

Criminal Procedure — Revision — Voluntary plea of guilty — Petitioner claiming to have been misled by counsel into pleading guilty — Petitioner claiming that counsel had not interviewed material witness — Freedom of choice — Criminal Procedure Code (Cap 68, 1985 Ed), ss 266 & 268 — Supreme Court of Judicature Act (Cap 322, 1985 Ed), ss 23 & 27

The petitioner had pleaded guilty to two charges of cheating under s 420 of the Penal Code (Cap 224, 1985 Ed). He was sentenced to five months' imprisonment. He filed a petition for revision of the plea of guilty claiming that his counsel had advised him that if he pleaded guilty and made restitution the court would only impose a fine. The petitioner also claimed that his counsel had failed to take a statement from a material witness who was not being called by the prosecution.

Held, dismissing the petition:

(1) In his petition the petitioner asserted that he was put under pressure to plead guilty as his counsel had told him that on the evidence adduced by the prosecution, his defence would fail and that if he pleaded guilty 'the court would impose a fine'. In his evidence in court the petitioner changed the allegation to a fine and a day's imprisonment. Obviously, the petitioner was still not sure what his original counsel had told him.

(2) Even assuming that the petitioner did not know that 'plea bargaining', in the sense of the court bargaining with the accused as to the sentence, was not a part of the administration of criminal justice in Singapore, the understanding that he would only be sentenced to pay a fine was wholly irrational.

(3) The petitioner's version of what his counsel had said to him was unreliable and that it was more probable that the counsel had advised him that there was a likelihood of a sentence of a fine and day's imprisonment.

(4) Even if the petitioner had been expressly told by his counsel that there had been an arrangement whereby he would only get a fine, there was no threat or pressure on him to plead guilty since he was not told and did not think that the alternative was a heavier sentence if he were found guilty.

(5) The petitioner had confused inducement with threat or pressure. The plea of guilty was self-induced and this was confirmed by the petitioner's own testimony. There was no denial of the free choice of the petitioner.

(6) The petitioner's counsel not having taken a statement from a material witness had nothing to do with the petitioner being denied his free choice or the absence of a fair trial since the petitioner elected to plead guilty voluntarily with full knowledge of the absence of the said witness in court. It related to the professional competence of counsel and was not relevant to the proceedings at hand.

Cases referred to

1 *R* v *Turner* [1970] 2 QB 321 (folld)
2 *R* v *Inns* [1975] Crim LR 182 (folld)
3 *R* v *Peace* [1976] Crim LR 119 (folld)
4 *R* v *Atkinson* [1978] 2 All ER 460 (folld)

PV Peter for the petitioner.
Lee Sing Lit (Deputy Senior State Counsel) for the respondent.

Cur Adv Vult

Chan Sek Keong J: This is a petition for revision of a plea of guilty by the petitioner to two charges of cheating under s 420 of the Penal Code (Cap 224, 1985 Ed) involving the procurement of false work permits for certain Bangladeshi workers. The petitioner was represented by counsel when he decided to plead guilty to the said charges.

The undisputed facts are as follows: the petitioner was charged on five counts of cheating under s 420 of the Penal Code (Cap 224, 1985 Ed). The trial commenced on 11 April 1989 and was adjourned in the afternoon of 12 April 1989. On adjournment, five prosecution witnesses had given evidence and been cross-examined by defence counsel. The trial resumed on 23 August 1989 and by 24 August 1989 afternoon, three more prosecution witnesses had given evidence and been cross-examined by defence counsel. The petitioner was ill on 25 August 1989 and the case was subsequently adjourned to 13/15 December 1989 for further hearing. On 13 December 1989, the prosecutor informed the court that the petitioner had agreed to take a certain course of action if only two charges were proceeded with, two other charges to be taken into consideration and the fifth charge withdrawn. The two charges were then read and explained to the petitioner. The notes of evidence of the district judge has the following entries: 'P1A and P2A. Charge read explained and understood. Pleads guilty to both charges. Understands the nature and consequences of such a plea. Facts to be tendered tomorrow'.

On 14 December 1989, the statement of facts was read out to the petitioner who admitted the facts stated therein. He also consented to the third and fourth charges being taken into consideration for the purpose of sentencing and also admitted the said charges. Counsel for the petitioner then made a speech in mitigation. The district judge imposed concurrent sentences of five months' imprisonment on each charge. He was acquitted and discharged on the fifth charge. The petitioner was taken aback by the sentence, and as the judge was leaving the courtroom said that he would appeal. Defence counsel filed the notice of appeal against sentence only on the same day and the petitioner was released on bail pending appeal. The petition of appeal was filed on 12 January 1990. It set out two grounds of appeal: (a) that the trial judge had not sufficiently taken into consideration the mitigating factors, and (b) that the sentence was manifestly excessive and inappropriate in the circumstances of the case. On 7 July 1990, the peti-

tioner, through his new solicitors, filed his petition for revision of the plea of guilty.

The grounds in support of this petition are set out in the following paragraphs of the petition:

5 Before the learned district judge passed sentence on your petitioner, he was put under pressure by his abovementioned counsel to plead guilty to the charges. Your petitioner was told by his counsel words to the effect that 'No other way. The facts and evidence are against you — you cannot win against this case'. His counsel advised your petitioner that if your petitioner did plead guilty and make restitution of $4,000 to the workers, the five charges would be reduced to two charges and the court would impose a fine, this being the only way out for your petitioner.

6 Your petitioner thought that this arrangement has been agreed upon by counsel with the police and the court and, on this understanding, your petitioner thought that there was no other alternative and decided to plead guilty to the first and second charges.

7 As advised by his counsel, your petitioner handed over $4,000 in cash to his counsel who in turn handed the same to a Detective Liau Hong Chang who was present in court on the morning of 14 December 1989.

8 When the court resumed, your petitioner's counsel informed the learned district judge that your petitioner had decided to take a certain course and a plea of guilty was taken on the first and second charges under s 420 Penal Code.

9 When the statement of facts was read to your petitioner through an interpreter, your petitioner admitted the facts stated therein, because he thought that the issue in respect of his sentence had been arranged between his counsel and the prosecutor and the court, as advised by his counsel.

10 Your petitioner realised the error only when the learned district judge imposed concurrent sentences of five months' imprisonment on each of the charges he pleaded guilty to ... Your petitioner exclaimed that he wanted to 'Appeal' in court. Your petitioner then saw his counsel leaving the courtroom. Your petitioner's counsel later returned and arranged bail for your petitioner.

11 When your petitioner managed to see his counsel a few days later, your petitioner asked his counsel why he was wrongly convicted for something which he did not do. His counsel then replied 'You did not give me bullet — how can I fight the battle?'.

12 During the course of investigations, the Criminal Investigation Department interviewed one Badal who is a Singapore agent named by your petitioner and the witnesses PW2, Moqbul Moral, and PW3, Mohd Abdul Gafur, in their respective testimonies. The said Badal is a material witness as he attended to the recruitment and the meeting with the five Bangladeshi workers.

Your petitioner could not trace the whereabouts of the said Badal. However, your petitioner ascertained from Detective Liau Hong Chang that the Criminal Investigation Department had interviewed the said Badal but refused to call Badal as a witness, thereby depriving your petitioner or his counsel the opportunity to cross-examine him and to provide the court with the material evidence and facts in respect of the charges.

13 Your petitioner's then counsel also failed to appreciate the importance of demanding a statement from and the attendance of the said Badal at court, thus placing your petitioner in a difficult position.

14 Your petitioner is of the humble view that had the said Badal been called as a witness there would have been no offences of cheating disclosed.

15 Your petitioner's then counsel, on instructions to appeal, filed the notice of appeal against sentence on 14 December 1989, the hearing of which was listed for 9 April 1990 and which has been further adjourned to the 12 July 1990.

16 However, your petitioner is of the humble view and prays that this honourable court, under the above circumstances, exercise its revisionary powers and order that the conviction be quashed and the sentence imposed on your petitioner be set aside or such order as may seem just. Your petitioner has involuntarily pleaded guilty as ill-advised by his then counsel and verily believes that he did not have a fair trial.

The applicant gave evidence on how he had been misled into pleading guilty. In his evidence-in-chief, he said:

On that day I was in courtroom with my lawyer. Before the court sat, he walked out of court and then came back. He then told me he had a discussion with people outside, government officials, and told me to plead guilty and compensate $4,000 to Bangladeshi workers, $1,000 per worker. He told me I was facing four charges but government officials were prepared to reduce charges to two. I asked him how I could plead guilty. I told him that if I had wanted to I would have done so much earlier. He said there was no alternative as there was sufficient evidence against me.

I then asked him what the consequences would be. He said there would be a fine and mandatory sentence of one day. I was thinking that to avoid the trouble of having to come to court so many times that if I pleaded guilty I could go back to my job.

I thought it had all been arranged by government officials. I thought by paying a fine, the matter would rest there and so I agreed to plead guilty. After that I saw government officials and Edwin Chan very busy at work. My case was only case fixed for hearing. I saw them walking out of court. I saw them going into a room from which the judge would come. Court had not sat yet. I thought that they were attending to my matter. I was under the impression that they were going to see the judge and that they had spoken to the judge and all had agreed to it. When they came out, the case was adjourned to 14 December 1989. I cannot recollect whether judge came out.

On 14 December 1989, I was in courtroom. Before hearing, Edwin Chan asked me whether I had $4,000 ready. I gave money to him. I saw him giving money to I/O. They were talking. Then they walked out of courtroom. I waited. Edwin Chan returned. A short while later the court sat. The interpreter read out charges to me and asked me for plea. I told him I was pleading guilty. Two charges read out to me. I sensed something was wrong. I thought all was

agreed. I thought it was a mistake. I was stunned. The police wanted to handcuff me. I then said I wanted to appeal to the people present ...

When I pleaded guilty, I was under impression I would be fined. I did not commit offences. He did not advise me not to plead guilty if I was not guilty.

The petitioner was cross-examined by the DPP. I reproduce below part of the cross-examination:

Q When [Edwin Chan] told you that [two charges to be proceeded with], did he say anything else?
A He said judge would impose a fine and could also jail me for a day.
Q Edwin Chan suggested either one?
A Fine or fine plus one day.
Q What Edwin Chan said cannot be true: s 420 provides for mandatory custodial sentence.
A I didn't know the law or that imprisonment mandatory. I thought everything agreed.
Q Impression: how did you get that impression?
A I was charged with five charges: later four charges and then reduced to two charges. So I thought they must have agreed.
Q How were these [events] linked to fine?
A Counsel told me I would be fined.
...
Q (By court) Did Edwin Chan tell you specifically all had agreed?
A He did not.
Q But he did not tell you it was a fine and one day.
A He did.
Q But you got impression that judge had agreed because they went into the room!
Q (By court) Did you see them going into judge's chambers?
A No, only the room leading to judge's chambers.
Q Did you see judge coming out and talking to them?
A No.

The petitioner also alleged that the nature and consequences of the plea of guilty had not been explained to him, as otherwise he would not have pleaded guilty to the charges.

Edwin Chan testified as follows:

Accused is my friend's brother. When introduced to me, I took case seriously. I did case gratis. Recorded his statement and then applied for papers. After getting papers, I met him to discuss matter. I made note that all along he maintained his innocence. I never told him we would win case.

After trial had gone on half-way, I was of opinion that evidence against him was very strong and after each day's hearing, he would go back to my office and we would discuss the evidence. At all times, he was afraid of going to jail. Asked me to do my best for him: family and business commitments, business dealing with marine fish, got contract to supply NUS fish for experiments.

I realized conviction likely. I told him we might not win case. That was on 13th morning. That's why we went to judge's chambers to have case stood down to approach prosecutor for plea bargain. I was aware courts generally sympathetic to accused who pleaded guilty and who made restitution.

I advised him the only possibility of fine and one day is to plead guilty and restitute. He told me to do my best. Then I went to see DPP and it was reduced to two charges. We then went to judge's chambers for adjournment for him to get ready. I told him possibility of fine. I never told him it would be a fine.

Edwin Chan was cross-examined by counsel for the petitioner. He maintained that he did not advise the petitioner that the judge would only impose a fine and a day's imprisonment but only that there was a possibility that the judge might impose a fine and a day's imprisonment and that the sentence was for the judge to decide. To a question from the court as to whether he had said anything that might have given the impression that the sentence would be a fine or a fine and a day's imprisonment, Edwin Chan's reply was that he had not. He also said that he was unaware that the petitioner had the impression he had alleged in this petition.

The testimony of the petitioner directly contradicts that of Edwin Chan on what was actually said by Edwin Chan in relation to the sentence. It is a contradiction which a court is normally obliged to resolve in any trial unless it makes no difference to the legal result. It is therefore convenient for me to determine the principle of law on which a plea of guilty may be set aside.

Counsel for the petitioner has relied strongly on the decision of *R* v *Turner*.[1] In that case, the appellant had pleaded not guilty at his trial on a charge of theft of his own motor car which he had left in a garage for repairs. The garage owners gave evidence that they considered the unilateral repossession a civil case. During an adjournment, he was advised by his counsel that if he pleaded guilty he would receive a non-custodial sentence. This was followed by a long discussion in court between the appellant, his sister and his girlfriend, the solicitor and counsel. Then counsel said he wanted to discuss the matter with the judge who was hearing the case. Counsel came back and gave his opinion of the case in the following words:

There is a very real possibility that if you are convicted by the jury and an attack has been made on the police officers, with your 16 previous convictions, you may receive a sentence of imprisonment. If at this stage you plead guilty, you must take my word for it, you will receive a fine or some other sentence which will not involve imprisonment.

Eventually, after repeated statements were made to him that the choice was his, the appellant pleaded guilty. He was fined £50 and in default four months' imprisonment, and his licence was endorsed. He appealed against the conviction on the following amended ground:

The appellant's mind did not go with his plea of guilty in that he at no time intended or wished to admit the offence charged, yet was induced to plead guilty on being advised by his counsel that having consulted with the learned trial judge in the matter of sentence, the appellant would definitely be sent to prison were he to proceed with his trial and

be convicted, whereas by pleading guilty he would receive a small fine. In all the circumstances the appellant was deprived of a free choice of pleading guilty or not guilty and was deprived of his opportunity to put his defence before the jury.

The Court of Appeal found that the appeal in so far as the appeal rested on undue influence must fail, as he had been told repeatedly that the choice was his. However, the court went on to say at pp 325-326:

> The matter, however, does not end there, because albeit it may be sufficient in the majority of cases if it is made clear to a prisoner that the final decision is his, however forcibly counsel may put it, the position is different if the advice is conveyed as the advice of someone who has seen the judge, and has given the impression that he is repeating the judge's views in the matter. As I have said, the court is quite satisfied Mr Grey [counsel] was giving his own views and not the judge's at all. But it had been conveyed to the appellant that Mr Grey had just returned from seeing the deputy chairman. What was said gave Mr Laity [solicitor] the impression that those were the judge's views, and Mr Grey very frankly said that in the circumstances the appellant might well have got the impression that they were the judge's views. Accordingly one asks: was he ever disabused of that, did anything happen to show that these were not the judge's views on the case?
>
> ...
>
> True, as I have said, he was warned that the choice was his, *but once he felt that this was an intimation emanating from the judge, it is really idle in the opinion of this court to think that he really had a free choice in the matter.*
>
> Accordingly ... and in all the circumstances of the case the court feels that the proper course will be to treat the plea that was given as a nullity, with the result that the trial that had taken place is a mistrial, and that there should be an order of a venire de novo. (Emphasis added.)

The principle applied in *R* v *Turner*[1] is freedom of choice. A long list of similar cases is set out at p 518 of *Crown Court Law And Practice* by Richard Bighams QC. In each of these cases, the judge played some role in each of the appellant's decision in pleading guilty which the court found had deprived the appellant of his power not to plead guilty. In *R* v *Inns*,[2] the Court of Appeal also declared a plea of guilty a nullity on the ground that the appellant had misunderstood the judge's intimation to his counsel, who had seen the judge in chambers on the probable sentence, as a threat. The appellant was discharged conditionally. The decision of the court is reported as follows:

> *Held*, the court did not intend to decide whose recollection of the unfortunate incident was the most reliable. It was surprised that it had happened, and hoped this sort of conversation would not take place again. The whole basis of a plea on arraignment was that the accused had a free choice. The law attached so much importance to a plea of guilty in open court that no further proof of guilt was required. A plea made under pressure and threats was not a proper plea and the proceedings thereafter were a nullity.

That the principle is freedom of choice is further confirmed by another decision where the Court of Appeal refused an application to set aside a plea of guilty. In *R* v *Peace*,[3] the appellant had pleaded guilty and was later pardoned after his employer's conviction for the same offences as a concerted party was quashed. He then applied for leave to set aside his plea of guilty on the ground that, after speaking to his counsel, he had formed the impression that counsel was not familiar with his case, thought he was guilty and would not represent him satisfactorily on a plea of not guilty. Counsel had said that if he pleaded guilty he would be sentenced to Borstal but if he pleaded not guilty he might receive three to four years' imprisonment, and that if he called his fiancee to support his alibi, she might be prosecuted for perjury. The appellant had little time to make up his mind and decided to plead guilty as the lesser of the two evils. He had an opportunity to tell his fiancee of his decision. She was unhappy about it but decided to stick to it. The Court of Appeal held that an ill-advised plea of guilty was not such an irregularity as came within s 2(1)(c) of the Criminal Appeal Act 1968. The court went on to say that the only possible alternative available to the appellant was an order of *venire de novo* on the ground that his plea was a nullity (and in *R* v *Inns*[2]), that what had to be shown was that the apparent plea of guilty was no plea at all because it was made under pressure or threats or the like circumstances in which the accused had no free choice but was driven to a certain course whether he liked it or not. The court held that the facts did not make the plea a nullity as the said applicant could not be said to have lost his power to make a voluntary and deliberate choice, and that it would be a serious matter if it were accepted that when counsel gave strong advice indicating the prospect of being found guilty and the alternative of pleading guilty it could be said that the plea was forced on the defendant. It was a question of fact in every case.

In *R* v *Peace*,[3] the judge played no role in the plea of guilty by the appellant who had obviously been greatly influenced by his counsel's strong advice of the outcome of the trial as well as the probable sentence.

In the case before me, I have to decide whether on the evidence the petitioner had no free choice when he pleaded guilty. What is his story? In para 5 of the petition which was drafted by counsel, the petitioner asserted that he was put under pressure to plead guilty as his counsel had told him that on the evidence adduced by the prosecution, his defence would fail and that if he pleaded guilty 'the court would impose a fine'. In his evidence in court, he changed the allegation to a fine and a day's imprisonment. Obviously, between the day he instructed the present counsel and the day he gave evidence in court, he was still not sure what Edwin Chan had told him. In para 6, he asserted that he 'thought that this arrangement had been agreed upon by his counsel with the police and the court and on this

understanding [he] thought there was no other alternative and decided to plead guilty ...'.

However, assuming that paras 5 and 6 were true, what do they suggest? They suggest that it was possible that there could have been such an arrangement between the petitioner (through his counsel), prosecutor and judge which the judge had failed to keep. In para 9 of the petition, the petitioner went even further to allege that 'he thought the issue in respect of his sentence had been arranged by his counsel and the prosecutor and the court, *as advised by his counsel*'. The petitioner, in his reply to a question from the court, has admitted that he did not receive such advice. Here again, the petitioner appeared to have forgotten what he had said in para 9 of his petition.

In the light of these two contradictions, the petitioner is left with his 'understanding' that there was this arrangement. When asked how he arrived at this understanding, he gave two reasons: (i) in the course of negotiating the plea of guilty, the prosecutor and his counsel went into a room from which the judge came into the courtroom and (ii) the prosecution agreed to proceed with only two charges against him after he had been charged with four charges. In my view, no reasonable person in the circumstances in which the petitioner was placed would have formed the alleged understanding on the basis of these two events. Even assuming that the petitioner did not know that 'plea-bargaining', in the sense of the court bargaining with the accused as to the sentence, is not part of the administration of criminal justice in Singapore (see Lord Scarman in *R* v *Atkinson*[4] at p 462), his understanding was wholly irrational, if not perverse, for the following reasons: firstly, Edwin Chan did not do anything or say anything before going into or after coming out of the room which suggested that the judge had agreed to any arrangement. Secondly, the petitioner's second reason implies that it was the prosecutor who was anxious to do a deal with him to secure his conviction and on that account had agreed to reduce the number of charges. As he well knew, he accepted his counsel's advice that there was no viable defence and that it was in his interest that a plea of guilty be negotiated on the best terms in the circumstances.

In my view, having regard to his statements in the petition which, it should also be noted, was only filed seven months after his conviction after receiving independent legal advice, and his evidence in this court, the petitioner's version of what his counsel had said to him is unreliable and that it was more probable that Edwin Chan had advised him that there was a likelihood of a sentence of a fine and a day's imprisonment, and that his advice could not have been stronger than that. The reason, in my view, is obvious. Edwin Chan was an experienced advocate and solicitor in criminal cases and he was aware that there was no such thing as 'plea bargaining' with the judge. It was therefore inconceivable that Edwin Chan could have told the petitioner that the judge would (in the sense of conveying the judge's intention, and not merely giving advice) impose a fine and a day's imprisonment.

But, assuming that the petitioner did have the understanding alleged in para 6 of the petition, how could he have 'thought' that there was no other alternative but to plead guilty? The thought process in this paragraph is difficult to understand. Even if the petitioner had been expressly told by his counsel that there had been such an arrangement, why was there no alternative to pleading guilty? There was no threat or pressure on him to plead guilty since he was not told and did not think that the alternative was a heavier sentence if he were found guilty. Since he had maintained his innocence all along, and this is confirmed by his own counsel, he could have rejected his counsel's advice and fought on in the hope of obtaining an acquittal. He could have discharged his counsel for lacking confidence in putting up a successful defence.

In my view, the petitioner has confused an inducement with a threat or pressure. Paragraph 9 must mean that the petitioner was induced into pleading guilty because of the arrangement. That should have been the ground for an application to set aside the plea of guilty and not the ground of denial of his free choice. Since, in fact, there was no such arrangement and the petitioner says that he pleaded guilty because he thought that there was such an arrangement, it must follow that the plea of guilty was self-induced. This is confirmed by his own testimony as follows: 'I was thinking that to avoid the trouble of coming to court so many times that if I pleaded guilty I could go back to my job ... I thought by paying a fine, the matter would rest there and so I agreed to plead guilty'. In my view, the petition was misconceived.

The other ground of this petition, that the applicant did not receive a fair trial because his counsel had failed to obtain a statement from or secure the attendance at the trial of one Badal, is also without merit. It has nothing to do with the petitioner being denied his free choice or the absence of a fair trial since the petitioner elected to plead guilty voluntarily with full knowledge of the absence of the said witness in court. It relates to the professional competence of counsel in conducting the defence, a matter which is not relevant in these proceedings.

For the above reasons, this petition is dismissed.

Petition dismissed.

Solicitors:

Reported by *Mathavan Devadas*